

105640

DEPT. OF TRANSPORTATION

**BEFORE THE UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

AUG 15 PM 1:56

In the Matter of:

**ACE DORAN HAULING & RIGGING, CO.,
Respondent**

)
)
)
)
)
)

Docket No. FMCSA-2000-6997 - 9

**MOTION TO STRIKE AND DENY
RESPONDENT'S CROSS MOTION
FOR RECONSIDERATION**

NOW COMES the Field Administrator for the Federal Motor Carrier Safety Administration, Midwestern Service Center, by and through his appointed Counsel who moves the Acting Chief Safety Officer to strike, or in the alternative to deny, Respondent's Cross Motion for Reconsideration as untimely and not in compliance with procedural regulations. In support of the Field Administrator's motion we state as follows:

BACKGROUND

In her July 11, 2000, Order for the above captioned matter, the Acting Chief Safety Officer reviewed both Part 390 of the Federal Motor Carrier Safety Regulations and the applicable case law, and concluded that supporting documents coming into the hands of owner-operators who drove for Ace Doran Hauling and Rigging Co. ("Ace Doran") were deemed to

have passed through Ace Doran's hands as well. Accordingly, the Order found for the Field Administrator and stated as follows:

Since toll receipts could have been used to verify the logs, they are supporting documents and as such, were required to have been retained by Ace Doran for six months.¹

On July 28, 2000 the Field Administrator filed a Petition for Reconsideration and Motion for Clarification wherein he requested the Acting Chief Safety Officer to reconsider this specific holding, or, in the alternative, to clarify the evidentiary standard imposed upon the Field Administrator before he may prevail on a Motion for Final Order which is based upon a failure to maintain supporting documents and before he may recover on his prayer for civil penalties.

On August 2, 2000, Respondent filed the subject Response to Motion for Reconsideration and Cross Motion of Respondent for Reconsideration.² It is the second part of Respondent's pleading - where **Respondent** seeks reconsideration - which is the subject of the Field Administrator's immediate motion.

ARGUMENT

Respondent's Cross Motion For Reconsideration Must be Stricken or Denied as Untimely Filed

1. The Motor Carrier Safety Regulations provide the parties with an opportunity to seek reconsideration of a findings of fact, conclusions of law or final order.³ However, Part 386.64

¹ Id, at 14.

² Respondent's Motion was received by the Office of Chief Counsel on August 7, 2000; however, it was not seen by the undersigned until August 15, 2000 when he returned to the office from vacation.

³ 49 CFR Part 386.64

specifically requires any such petition to be filed "within 20 days after the Associate Administrator's final order is issued...." ⁴

2. While the Field Administrator complied with the requirements of Part 386.64 and filed his motion prior to the July 31 cutoff date, Respondent waited to file his motion to a date that was already **outside** the 20 day period.

3. Respondent could have sought an extension of time for good cause shown under Part 386.33; however, Respondent failed to do this as well.

4. Respondent's filing of its Cross Motion for Reconsideration was in no way dependent upon the content of the Field Administrator's petition nor upon the timing of the Field Administrator's petition.

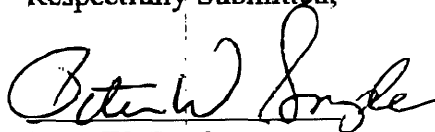
4. Equally obvious is the fact that Respondent's failure to timely file its cross motion for reconsideration cannot be remedied simply by piggybacking it upon its response to the Field Administrator's petition.

⁴ Id.

WHEREFORE, the Field Administrator requests the Acting Chief Safety Officer to strike or otherwise deny the Respondent's Cross Motion for Reconsideration as untimely and not in compliance with 49 CFR Part 386.64.

Dated: August 15, 2000

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Peter W. Snyder", is written over a horizontal line.

Peter W. Snyder
Assistant Midwest Counsel
Office of Chief Counsel
19900 Governors Drive
Olympia Fields, Illinois 60461
(708) 283-3559
(708) 283-3508 (Fax)

CERTIFICATE OF SERVICE

This is to certify that on this 15th day of August, 2000, the undersigned faxed and delivered, as specified, the designated number of copies of the forgoing document to the persons listed below:

Anthony J. McMahon
Attorney for Ace Doran Hauling &
Rigging Co.
6106 MacArthur Blvd., Suite 110
Bethesda, MD 20816
(301) 263-0588

One Copy
Faxed & by Certified Mail

Ace Doran Rigging & Hauling
1601 Blue Rock Street
Cincinnati, Ohio 45223
(513) 853-3196

One Copy
Faxed & by Certified Mail

Julie Anna Cirillo
Acting Chief Safety Officer
Federal Motor Carrier Safety Administration
Attn: Steven Farbman, Esq.
Adjudications Counsel
Federal Highway Administration
HCC-30, Room 4230
400 7th Street SW
Washington, DC 20590
(202) 366-7499

One Copy
Faxed & by Certified Mail

U.S. DOT Dockets
U.S. Department of Transportation
400 7th Street S.W.
Room PL-401
Washington, DC 20590
(202) 366-7499

One Copy
Faxed

Greg Roling
Enforcement Program Manager
Federal Motor Carrier Safety Administration
Midwest Service Center
19900 Governors Drive
Olympia Fields, Illinois 60461

One Copy
Hand Delivered

Dated: 8/15/2000

Brenda L. Butcher